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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1960

No. 502

AMERICAN MUTUAL LIABILITY INSURANCE Co., a corporation,
Petitioner,

vs.

E. VERNON ASHLEY, KATHLEEN ANN GOFF, CHARLES T. GOFF, JR., and BETTE JO GOFF, Minors, By and Through Their Guardian ad Litem, Charles T. Goff, and CHARLES T. GOFF,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

STATEMENT OF THE CASE.

On the 9th day of January, 1955, E. Vernon Ashley, a licensed, practicing physician of the State of Cali-

fornia, made an application for a policy of malpractice insurance with defendant (petitioner herein), American Mutual Liability Insurance Co. (T. 55.) A binder policy was issued with the application (T. 60) and the policy was renewed on May 1, 1956 for a period of one year. (T. 8-25.)

During the month of October, 1955, Bette Jo Goff, the wife and mother of the plaintiffs herein, while under the care of E. Vernon Ashley, died as a result of Ashley's malpractice. Suit was filed in December, 1955 in the County of San Joaquin, State of California and at which time the defendant (petitioner herein), American Mutual Liability Insurance Co., retained the law firms of Neumiller, Ditz & Beardslee and Peart, Baraty & Hassard to represent Ashley. (T. 152-153.)

In June of 1956 the above two named law firms were substituted by Leroy F. Parker, Esq. for the defense of the malpractice suit. (T. 153.) Prior to this substitution of attorneys, the defendant (petitioner herein) notified E. Vernon Ashley that it was rescinding the policy of malpractice insurance, defendant's Exhibit B. (T. 134; Paragraph VI of defendant's Amended Answer and Cross-Claim.) Ashley cashed the check for the return premiums, defendant's Exhibit C (T. 134) after filing the present action for declaration of rights of the insurance policy. Trial was held in April of 1957 and a judgment for $75,932.00 was returned against Ashley. Dr. Ashley, prior to the trial of the malpractice suit, substituted Leroy F. Parker, Esq. by appearing in propria persona. At the trial of the matter therein Ashley did not appear.

In November of 1957 (T. 124) Ashley filed a Petition in Bankruptcy in the United States District Court for the Northern District of California, Northern Division. The policy of insurance is not an asset of the bankrupt. However, the claim against Ashley has been discharged by the Bankruptcy Court.

During the month of November, 1954, Dr. Ashley was in the Glendale Sanitarium (T. 139) while he was an employee of Dr. A. E. Carter. (T. 146.) At that time Ashley had a conversation with a Ward Mikkelson who was the business manager of Carter's clinic. (T. 136.) The conversation concerned a purported expression of dissatisfaction of treatment by a Mrs. Adelstein against Ashley. (T. 138.) Mr. Mikkelson testified the basis of his knowledge of Mrs. Adelstein's grievance was given to him by Gladys Carter, wife of Dr. Carter. (T. 137.) Mrs. Carter testified that a nurse in her husband's office had told her that Mrs. Adelstein had talked with the nurse by telephone and had told the nurse that Adelstein was dissatisfied with the work of Dr. Ashley (T. 142) and that no demand was made. (T. 143.)

Dr. Carter, a licensed physician of the State of California, and the employer of Ashley, during the month of November, 1955, had written Dr. Ashley a letter to the effect there might be an impending law suit by Mrs. Adelstein against him and Dr. Ashley, defendant's Exhibit C. (T. 146.) He based his knowledge of Mrs. Adelstein's dissatisfaction on information given to him by his wife and the girls in his office. (T. 148.)

On November 26, 1954, E. Vernon Ashley pleaded guilty to three counts of Violation of Section 11165 of the Health & Safety Code of the State of California and to one count of Violation of Section 11225 of the Health & Safety Code of the State of California, defendant's Exhibit F.

On February 16, 1955, Mrs. Adelstein through her attorneys filed a Complaint against Ashley and others alleging improper medical treatment. Defendant's Exhibit E.

Mr. Thomas Hadfield, the vice president in charge of the Malpractice Division of the defendant company testified that he gave notice of rescission of the insurance contract to Ashley. He further testified that the notice of rescission was based on information obtained from Ashley by a member of the law firm employed by the defendant company to defend Ashley in the malpractice suit in which the Goffs were party plaintiffs. (T. 155.) He also testified that no agent contacted Ashley regarding the application for insurance and that no instructions were given or forwarded with the application. (T. 159.) The defendant company did not ordinarily look for addiction to narcotics or alcohol, but the new application form will contain questions as to the use of narcotics. (T. 163.)

REASONS WHY WRIT SHOULD NOT BE GRANTED.

I

THE COURT OF APPEAL'S DECISION IS NOT IN CONFLICT WITH APPLICABLE CALIFORNIA LAW.

Petitioner's contention that Dr. Ashley's conviction under Sections 11165 and 11225 of the Health and Safety Code of the State of California amounted to moral turpitude is not justified by cases it cites as authority. As to *Meyer v. Board of Medical Examiners*, 34 Cal. 2d 62, and *Davis v. State Board of Medical Examiners*, 108 Cal. App. 2d 356, these are cases concerned with the violation of Section 11164 of the Health and Safety Code, which is furnishing drugs to a known addict and bears no relationship to the charges placed against Ashley. Further, under the holding of *Brainard v. The State Board of Medical Examiners*, 68 Cal. 2d 591, the violation of Section 11225 does not involve the offense of moral turpitude, but the circumstances surrounding the commission might. There has been no showing in this case that the circumstances surrounding the violation of Section 11225 involved the question of moral turpitude.

It is well settled law that the insurer is bound to use such language as to make the contract clear to the ordinary mind. Any ambiguity, uncertainty, or reasonable doubt is to be resolved by a construction in favor of the insured. *Artukovich v. St. Paul Mercury Indemnity Co.*, 150 Cal. App. 2d 312; *Oil Base Incorporated v. Transport Indemnity Co.*, 143 C.A. 2d 453; *Wildman v. Government Employees Insurance Co.*, 48 Cal. 2d 31; *Arenson v. National Auto & Casualty*

Insurance Co., 48 Cal. 2d 528. Various legal authorities in defining the word "claim", have given the import of "to demand as due". *U. S. v. Trezer*, C.A.N.J. 234 Fed. 2d 589; *U. S. v. Lockwood*, 81 Fed. 2d 468; *Williams v. U. S.*, 134 Fed. Supp. 333; *U. S. v. Spalding*, 13 N.W. 357, 360; *U. S. Bank v. Ajax Utah*, 297 Pac. 434; *Stewart v. McCallister*, 220 Pac. 2d 618; *People v. Teitelbaum*, 163 Cal. App. 2d 187. The record of the trial does not contain any instance where a demand was made upon Ashley. Hence, the petitioner has not met its burden of proof that a claim in fact ever was made or that Ashley acted in bad faith.

Before concealment may be a basis for rescission the concealment must be material. It would be presumed that the insurer would ask in its application of things it felt to be material. *Olson v. Standard Marine Insurance Co.*, 109 Cal. App. 2d 130. Thus it would follow that if the question is not asked and the matter is not brought forth voluntarily by the applicant, the insurer cannot complain for the matter is not material.

Petitioner's authorities cited on page 11 of its brief do cover the law regarding fraud in reference to insurance contracts, however, they are not pertinent herein, for the factual situation in those cases is where the applicant for a life insurance policy misrepresented his physical condition in response to direct question concerning his disability. It was found by the trial court and approved by the Court of Appeals that as a matter of fact that question 15 of the application was ambiguous and there was no misrepresentation as

to whether or not a claim had been lodged against Ashley. Further, it was found that petitioner had not established that Ashley's convictions were material or that any inquiry was directed toward the subject. From the foregoing facts the Court of Appeals for the Ninth Circuit did apply the law applicable.

Ashley's acceptance of the check tendered with the letter from plaintiff containing the offer of rescission cannot alter the rights of the Goff family under the contract. The cause of action for malpractice had arisen in October 1955 and at which time the Goff family became the beneficiaries of the policy. The notice of rescission and the check were tendered in June, 1956, and the rights of the Goff family under the policy had matured at that time. *Hooker v. American Insurance Co.*, 12 Cal. App. 2d 116; Section 2313 *Civil Code of California*; *Grosam Casualty Co. v. Boyd*, 34 F. 2d 116.

CONCLUSION

For the foregoing reasons, it is respectfully submitted, the Petition for Writ of Certiorari should be denied.

Dated, Modesto, California,
November 16, 1960.

J. WILMAR JENSEN,
Attorney for Respondents.

WILLIAM R. LUNDGREN,
HANCOCK & LUNDGREN,
Of Counsel.